EXPERT EVIDENCE THE VIEW FROM THE BENCH

By Wayne Cochrane Member Land Court of Queensland[1]

Section 1 : What is an expert?

It might be thought, upon first glance, that the definition of what might constitute a witness as an expert would be a simple one. One approach would be to consider how expert witnesses have been described by the superior courts. For example, in *David v. Edinburgh Magistrates*[2], Lord President Cooper said:-

> *"Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgement by the application of those criteria to the facts proved in evidence."*

An expert witness is a witness who gives evidence on a matter or matters which is within a field of expertise.

Expert evidence has been a feature of the English court system since the 18th century.

That well known repository of all of the world's knowledge Wikipedia records "the earliest known use of an expert witness in English law came in 1782, when a court that was hearing litigation relating to the silting up of Wells Harbour in Norfolk accepted evidence from a leading civil engineer, John Smeaton. This decision by the court to accept Smeaton's evidence is widely cited as the root of modern rules on expert evidence".

The Courts have also considered what might be described as a "field of expertise and have found that that is best described as an "organised branch of knowledge"[3]. That definition leaves open the question of what is an "organised branch of knowledge.

Some legislation in Australia has attempted to define an expert. For example, Section 9 of the Corporation Law provides:-

> *"Expert, in relation to a matter, means a person whose profession or reputation gives authority to a statement made by him or her in relation to that matter."*

Simply the Australian Federal Court Rules at Order 34 Rule 2(2) provides:-

> *"An expert, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of the question, that in his opinion would be admissible in evidence."*

Again, in a similar vein, the Australian High Court Rules provide at Order 39 Rule 1 that an "expert" includes "*a scientific person, a lawyer, a medical man, an engineer, an accountant, an actuary, an architect, surveyor or other skilled person whose opinion on a question relevant to the issues involved would be received by the Court.*"

---

[1] 2010. Prior to that he was a Brisbane based Barrister who practiced extensively in the area of Local Government, Planning and Environment Law, Construction Law, Personal Injuries and Land Law.

[2] *Davie v. Edinburgh Magistrates* (1953) SC 34 at p.40.

[3] See *Cooper v. Beck* (1975) 12 SASR 153.

Generally, an expert is regarded as a witness who is qualified to testify to a field of knowledge which is beyond the experience of the tribunal of fact. It follows that the issue of a witnesses qualifications and expertise often need first to be established prior to a tribunal being prepared to hear evidence from that alleged expert.

The NSW Court of Appeal had occasioned to consider what constituted specialised knowledge in *Makita (Australia) Pty Ltd v Sprowles*[4]. In that case Heydon JA (as he then was) said:[5]

> *"In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in HG v R [1999] HCA 2; (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41])."*

There has in the past been a view that a field cannot be the subject of expertise unless it can be described as an "organised branch of knowledge". For a tribunal to receive assistance from an expert the field of knowledge must be one in which human knowledge has advanced to an organisational point where it is possible to have expertise and it can be regarded as a reliable guide to inferences. That is not to say that a field must be infallible. It may be sufficiently reliable to assist a tribunal to make an accurate decision without necessarily being regarded as being infallible. In particular, doubts about the accuracy of a particular technique or a particular manner of analysing data is a fertile ground for cross-examination which itself is aimed at undermining the weight of the evidence.

In their looseleaf series on Expert Evidence, Frekelton & Selby identify five rules that govern the admissibility of expert evidence[6]. It is worth identifying and considering the five rules which they list. They are:-

1. "*The Expertise Rule*" : does the witness have knowledge and experience sufficient to entitle him or her to be held out as an expert who can assist the Court.

---

[4] [2001] 52 NSWLR 705.

[5] Ibid para 85.

[6] (See Frekelton & Selby, *Expert Evidence*, Law Book Company.)

2. "*The Common Knowledge Rule*" : is the information sought to be elicited from the expert really something upon which the tribunal needs the help of any third party or can the tribunal rely upon its general knowledge and commonsense?

3. "*The Area of Expertise Rule*" : is the claimed knowledge and expertise sufficiently recognised as credible by others capable of evaluating its theoretical and experiential foundations?

4. "*The Ultimate Issue Rule´*: is the expert's contribution going to have the effect of supplanting the function of the tribunal to decide the issue before the Court? If so, is it likely to be rejected?

4. "*The Basis Rule*" : to what extent can an expert's opinion be based upon matters not directly within the expert's own observations.

Frekelton & Selby also point out that those rules which relate to the admissibility of expert evidence are constantly being stretched and modified as Courts attempt to confront new developments in new and previously unrecognised areas of expertise.

Expert evidence and its acceptance by Courts is an exception to the general rule that witnesses may not give evidence of opinion but only of fact.

The evidence of valuers has become an essential feature of hearings in the Land Court to determine valuations and compensation.

Its importance has been recognised by the inclusion of special rules relating to expert evidence in the *Land Court Rules: Part 5 – Evidence.*

***Process in Court*:-**

The assistance to a Court by an expert's evidence will be given in four main ways:-

1. an expert report (and possibly a reply to the contents of another report) tendered at the beginning of or during a Court case;

2. evidence in chief;

3. cross-examination;

4. Re-examiantion.

The Written Report:-

A witness may be qualified to testify about an organised area of knowledge either through the acquisition of formal qualifications or by the obtaining of direct experience.

As experts come before the Court the degree of specialisation and training which will be necessary to show that that expert's evidence will be useful to the Court will depend upon the kind of expertise involved. The more technical the area concerned the more specialised and qualified a witness will need to be.

In *R. v. Duncan*[7], the New South Wales Court of Criminal Appeal said (at p.678):-

[7] *R. v. Duncan* (1929) 2 NSWR 675.

> "*At one end of the scale of expert witnesses there is that class of matter as to which a sufficient experience is possessed by every person of ordinary fortunes in life, the kind of skill in the ordinary use of the senses which is developed in the daily round… At the other end of the scale stand the matters as to which it is only by means of some special and peculiar scientific experience… that a person becomes competent to acquire knowledge.*"

Another limit to an expert's capacity to assist the Court is that an expert witness may only give evidence as to opinions which are within the witnesses' field of expertise. There is a constant temptation succumb to by both lawyers and experts for experts, giving evidence before a Court, to drift from the areas of their expertise into areas in which they are not really qualified to give evidence which would assist the Court. It should also be noted that no matter how strongly an expert witness may give evidence before a tribunal, the drawing of the inference which is in question before that tribunal remains within the province of the tribunal whatever the opinions of the witnesses. The function of the expert is not to ultimately decide the issues but to provide assistance to the tribunal of fact in reaching the decisions or in drawing inferences from matters established to the satisfaction of that tribunal.

There are a number of matters which a tribunal of fact will take into account when assessing the evidence given by various experts and deciding which evidence to accept and which to reject either in whole or in part.

Amongst the matters considered by the tribunal of fact are the following:-

- The weight of the expert's opinion.
- The logical underpinning to the opinion.
- The relative skill of the witness.
- The certainty of the facts on which the opinion was based.
- The attested reliability of the procedures used.
- The competency of the persons using particular procedures.
- The impartiality of the witness.

The last point is a particularly difficult one as it is generally regarded as undesirable to allow an expert to become involved in the decision-making process as distinct from providing useful information and opinions to the decision-maker whether that be a Judge or a jury. It is generally referred to as a reluctance to allow the expert to determine the ultimate issue.

Most useful expert reports are those which are clearly structured, easy to follow and lead logically to a conclusion. It is important to recall however than an expert is not an advocate and, at least so far as those who are members of professions are concerned, have an ethical responsibility and duty to give their evidence in an unbiased and thoroughly professional way. Such professionalism involves being able to acknowledge when parts of an opinion are susceptible to some doubt. The following matters would appear to be self-evidently required in a properly structured report:-

- An indication of those factual matters which have been either accepted or assumed to exist by the expert.
- An identification of the sources of information or opinion which have been referred to by the expert.
- An explanation of the approach used by the expert in carrying out the analysis which is contained within the report.
- An outline of the nature of any investigations which have been carried out, the information revealed by those investigations, the methodology used in analysing observations during the investigation and the conclusions or inferences which are drawn from those investigations.

It is important in the context of professionalism and ethical responsibility for expert witnesses to recall at all times that, notwithstanding that they are being paid by a particular party to give evidence, their report ought to be truly professional and expert. It is important also that truly expert witnesses should not allow their opinions or their approaches to be over-borne by either their clients or by lawyers engaged by their clients. At the end of the day the test might simply be described as whether an expert feels comfortable giving the evidence that is being sought from him or her. The concept of professional objectivity is accepted in principle but is not, in practice, always applied. Frequently practitioners appearing before the Court and Judges sitting on the Court have the experience of an expert seeking to become an advocate and present only the evidence and arguments in favour of a particular client's point of view or proposal. Often, by omitting either deliberately or by oversight to acknowledge or to point out those matters which are not strongly in favour of a particular client's position, experts leave themselves open to attach by the representatives of an opposing party and can, through the process of cross-examination which is referred to below, be made to appear to be less objective and professional than they would had they frankly admitted the opposing views and address them in their report as to show that they did not, in the overall scheme of things, substantially diminish their client's position or view. That is not to say that an expert should not expert to consult with legal advisors and in particular the legal representatives who may adduce evidence from the expert in Court prior to the preparation of a report. That should be seen however as collusion about the way in which particular opinions are expressed rather than collusion about what opinion will be expressed.

The Courts have on a number of occasions spoken of the dangers which are inherent in a litigation team interfering too greatly in the content form and structure of reports prepared by experts. For example, a pre-eminent English Judge Lord Wilberforce commented in *Whitehouse v. Jordan* (1981) 1 All E.R. 267 (at 276):-

> "*While some degree of consultation between experts and legal advisors is entirely proper, it is necessary that expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only correct, but self-defeating.*"

It is worth noting that expert report and the evidence which they form in Court will often contain what in any other circumstance would clearly be objectionable hearsay. In the case of experts, opinion evidence based on hearsay will be admitted, as an exception to the general rule, if the material is information commonly relied on or widely used by members of the expert's profession in their professional work[8].

Further detail about the exception may be gathered from an article prepared by Dr R Pattendon entitled "*Expert Opinion Evidence based on Hearsay*"[9].

In a recent Western Australian decision[10], the Full Court of the Supreme Court of Western Australia ruled that evidence which had been adduced through an expert witness concerning the value of mining tenements was inadmissible because the factual matters upon which the opinion was based was not formally proved at the trial. In his decision Ipp J (with whom Malcolm CJ agreed) said[11]:-

> "*In my opinion, expert opinion based entirely on inadmissible evidence is itself inadmissible and there is no discretion to admit it … if the primary facts upon which the evidence is based are not admissible, the opinion is valueless and irrelevant and, in my opinion, should be excluded .. It is only when the primary facts upon which the*

[8] See *Borowski v. Quayle* (1966) VR 382
[9] (1982) Crim.LR 5
[10] *Powenall & Ors v. Conlan Management Pty Ltd & Anor* (1995) 12 WAR 370
[11] At page 377

> *opinion has been based are established that the opinion should be admitted into evidence.*
> *On the other hand, where the expert opinion is based only partly on inadmissible testimony and that inadmissible testimony can readily be ascertained and discarded the opinion should be admitted subject to weight …*
> *Where the expert opinion is based on a combination of admissible and inadmissible material, and it is impossible to determine what conclusions are based on the expert's own observations and what conclusions are based on what he has been told. Or to what degree the expert has been influenced by the hearsay material, the evidence should be excluded.*"

Anderson J said[12]:-

> "*Before considering Mr Adam's report I should set out what I believe to be the legal rules concerning the admissibility of expert opinion (whether in the form of a report or otherwise) which is based upon data about which the expert can give no direct evidence the general rule is that an expert opinion is of no value unless the facts upon which it is based are provided by admissible evidence: see Ramsay v. Watson (1961) 108 CLR 642; Paric v. John Holland (Constructions) Pty Ltd (1985) 59 ALR 844; Steffen v. Ruban (1966) 84 WN (Pt 1) (NSW) 264.*"
> (His Honour then went on to refer to the article by Dr R Pattendon)

Section 2 : Preparing reports for Courts

It is impossible to be prescriptive as to what a report should contain. The topics upon which reports are called for vary so extensively that no one framework can be applied for all reports.

It would seem however that the following matters must always be addressed in the report:-

1. An indication of what the report is about and also an indication of any instructions given to and questions asked of the expert;
2. A statement of the relevant background material including the factual basis upon which the report is founded;
3. A clear statement of any assumptions which have been made in the preparation of the report;
4. A clear and concise outline of the methodology which has been adopted in preparing and producing the report;
5. The conclusions that have been reached from the application of the methodology;
6. An acknowledgement of and a consideration given to opposing points of view and alternative conclusions;
7. The application of the conclusions to the matter before the Court;
8. The existence and applicability of any Australian Standards.

Reports which are clear and concise and not overly verbose are generally more useful.

It should be remembered that the persons reading and seeking to understand the reports are to be regarded as lay persons without the particular expertise, qualifications or background of the author. In that case it is important that complex procedures and relationships should be explained as simply as possible.

It is most important, and a source of some irritation to Judges regularly sitting in Courts, that experts should not presume to tell the Court what the laws is or to attempt to say how particular requirements or provisions, for example in Town Planning Schemes, should be interpreted. The following passage

[12] At page 387/8

from a Planning and Environment Court hearing in 1996 is typical of the response of Judges to reports which seem to be trying to do the Judge's job for him or her.

In a Town Planning Appeal, before any evidence had been given, the following exchange:-

> "*HIS HONOUR: Mr Barrister? There seems to be a misconception in this part of the world – about the functions of planners and the functions of Judges. The report which you tendered from your planner is lauded with references to cases and rather unfortunately at one stage appears to be telling me what I should decide. I'm afraid that's not acceptable. What do you propose to do about it?*
>
> *MR BARRISTER: Your Honour, I brought that up with the witness. I could arrange for an amended report to be tendered and to retrieve that which is objectionable and I appreciate Your Honour's remarks about that quite clarly.*
>
> *HIS HONOUR: Yes. Very well, I will also you to withdraw from tender Exhibit 21. If the next one contains anything of a similar nature, it will not only be withdrawn from tender, but I will not hear anything in relation to it. In fact, what I shall do is – I think the witness should give his evidence orally. I don't think I'm going to accept documents of that sort if they can't be better produced than that, then I won't accept a document at all. The evidence can be given orally.*
>
> *MR BARRISTER: Beg yours?*
>
> *HIS HONOUR: The evidence can be given orally.*
>
> *MR BARRISTER: Very well, Your Honour.*
>
> *HIS HONOUR: I will not accept a document from a witness who misconceives his position in that particular way.*"

That difficulty is often referred to as "swearing the issue" and is to be avoided because, as the extract above makes clear it tends towards a position where a witness is telling a judge what that judge ought to decide rather than giving evidence of that witness' opinions and direct evidence of what the expert has become aware.

Section 3 : Before the Hearing

The Land Court has developed a set of protocols for conclaves or joint meetings between experts in their various fields.

The function of those meetings or conclaves is, as it is within the Planning and Environment Court as well, to explore and identify:-

a) Areas of agreement
b) Areas of disagreement
c) The reasons for such disagreement.

The participation in those conclaves requires that the experts alone should meet and apply their professional minds to the matters in issue unfettered by the preferred outcomes of their individual clients.

Indeed, experts are cautioned against accepting instructions to decline to reach agreement or to refuse to make sensible professional concessions if such matters are raised by the opposing expert.

Participation in those conclaves is the hallmark of truly professional conduct and to the extent that experts from opposing parties can meet in such conclaves and reach agreement should be applauded, not least for the professional robustness which is evidenced by a capacity to reach such agreement even if it involves retreating from a position, earlier, very earnestly advanced.

Experts are often accused of being "hired guns", engaged only because they are willing to advance the arguments preferred by their clients to the abrogation of their professional responsibilities.

My own experience both as a Barrister and a Member sitting on Land Court matters is that that is generally not the case.

The Land Court (and I think from conversations with Judges of the Planning and Environment Court as well) is well served by the frequent presence of experienced valuers who well recognise their professional responsibilities.

The same applies to other experts who regularly appear in my Court including town planners, hydraulics engineers, geologists and many professions.

On the rare occasions that another expert witness clothes him or herself in the accoutrements of a "hired gun" and fails to make sensible concessions, seeks to act as an advocate rather than as a witness assisting the Court and generally argues the unarguable, they quickly becomes revealed for what they are.

There is one area however of the giving of expert evidence, particularly relating to valuers, which is of concern to me personally.

In years gone by I have been aware of valuers who are routinely engaged by large corporations and significant property owners to fight valuation appeals as a matter of course. I have been both surprised and saddened on rare occasions to discover that valuers giving evidence have been a party to a structured fee arrangement which involves a "success fee" payable if the valuer is able to successfully defend his or her opinion about the value of a property.

The revelation of such an arrangement can do nothing but cast doubt on the professional credibility of the witness where the evidence that witness is giving has the potential to yield a greater reward for that witness if the evidence the witness gives is accepted by the Court. There is no way in which such a situation would engender full and frank professional evidence being given. By entering into such an arrangement for a :"success fee" the expert inevitably taints their own credibility and hence the worth of the evidence which they are giving.

That is not to say that an expert witness who has a close and enduring association with particular clients over a period of many years is automatically tainted by such an association. The Court frequently has appear before it experts who have, as a matter of common knowledge, appeared for particular parties on previous occasions. Such an arrangement does nothing to affect their independence or their professionalism and I would want to make that very clear.

Such a close association, of course, will often open the opportunity for detailed cross-examination of opinions proffered in previous cases where the opinion of that particular expert may not have been preferred over the evidence of another.

Section 4 : Giving evidence

As is clear from a reading of the Land Court Rules relating to expert evidence the Land Court has put in place a form of case management which requires meetings between experts in like specialised fields so that those experts can, prior to finalising a report for Court and giving evidence before Court meet with their fellow professionals in order to:

a) Identify matters that can be agreed between those experts.
b) Identify areas of dispute or disagreement between those experts and;
c) Provide an outline, as best they are able, explaining why those areas of disagreement exist or are maintained.

It is important that experts attending such meetings understand that the process is "without prejudice" and must be based solely upon the experts professional opinion.

It is unacceptable for an expert to accept instructions to adopt a fixed view or stance and not yield to any agreement with opposing experts. That is to say their conduct in the joint expert meeting should reflect professionalism and not partisanship.

The joint expert meetings take place in the absence of clients or lawyers and the experts should not consult with their client or their expert in the formulation of the joint report.

As the process has evolved over time some of the more experienced experts occasionally meet on more than one occasion because often dialogue in the joint meeting will reveal matters that require further investigation.

Such conduct is a healthy reflection of a professional approach to participation in those joint meetings.

The outcome of the joint reporting process is of course to allow for vastly more focused final reports to be prepared because of the absence of any need to deal in detail with the areas of agreement. Accordingly the expert reports which ultimately are placed in evidence before the Court focus on and address the areas of disagreement and the reasons for those disagreements.

It should go without saying that experts participating in the joint reporting process should be fully briefed and properly prepared. I must, in fairness to practitioners who regularly participate in the joint meeting process that it is extremely rare to have complaint made about experts coming along without being properly briefed or without being properly and fully prepared. That is commendable.

Because of the sometimes crucial nature and effect of expert evidence, most Courts nowadays have rules dealing with the manner in which notice is to be given, and in some cases, the form of expert evidence.

As set out above the Land Court has now incorporated specific rules for experts to follow in the preparation and presentation of reports. In my view it is important for valuers proposing to give evidence before the Land Court to develop a high degree of familiarity with the provisions of those Land Court Rules set out in Part 5 – Evidence from Rules 22 through to Rule 24J.

Practitioners ought be alert to the requirements of Rule 423 – Disclosure of Expert Evidence contained within the *Uniform Civil Procedure Rules*. Likewise, the Federal Court of Australia in August 2000 issued a practice direction entitled "*Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*" with a preamble directing that:-

> "*Practitioners should give a copy of the following guidelines to any expert witness they propose to retain for the purpose of giving a report and giving evidence in a proceeding.*"

Similarly, the Planning and Environment Court in September 2000 issued Practice Direction No. 1 which deals, amongst other matters, with expert evidence and produces a set of guidelines which must be given to experts whom it is proposed to call to given evidence. Perusal of that document shows that the Court generally has had regard to the observations made by other Courts as to the general duty of an expert witness to a Court and the need to make clear the basis upon which an expert has reached an opinion

which it is to be proffered to the Court. The guidelines for experts of the Planning and Environment Court are really a very useful guideline to experts being asked to give evidence in any Court. They are worth reading carefully, if only to avoid embarrassment before that Court of being admonished for not abiding by the Practice Direction.

The Land Court has also inserted into its Rules as mentioned elsewhere in this paper a set of rules that deal with evidence before the Land Court and with evidence given by experts in particular (see Rules 22 to 24I).

Once a report has been prepared and a Court case begins the report itself will often be placed before the Court "subject to proof" which means a Judge is asked to receive the report and to read it contingent upon the author of the report being called to give evidence and giving evidence initially that the report is that expert's own report. Usually experts will be asked a series of questions along the lines of:-

1. In connection with the giving of your evidence before the Court today have you prepared a report?

2. Are the facts and circumstances contained within that report true and correct to the best of your knowledge and belief?

3. Are the opinions expressed within that report your own opinions honestly held?

Once the report has been "proved" in that way when the process of giving of evidence will proceed. That consists of three identifiable facets namely:-

1. Evidence in chief or examination in chief;

2. Cross-examination;

3. Re-examination.

Evidence in Chief

Over time the inclination of Courts to allow evidence in chief for expert witnesses to be delivered orally in circumstances where they have also provided a written report has diminished.

In my view the current convention is that the written reports prepared by experts constitute their evidence in chief. Oral evidence in chief will generally only be permitted where leave is given to clarify some aspects of what is contained within the written reports and to respond to written reports prepared by other experts.

Evidence in chief, so far as it relates to experts, generally consists of drawing from the expert by way of oral examination an outline of the most important facts and information contained within their report and highlight conclusions within that report which support one case or another.

The role of assumed facts in an expert report is very important. Where an expert opinion is based upon assumed facts those facts must be made clear to the tribunal and should be capable of proof through admissible evidence whether or not the other parties to the action require such evidence to be called. Generally expert opinions are provided to the Court as hypothetical constructs based upon assumed facts. Those opinions, while admissible, will be of no evidentiary or probative value if the facts assumed in arriving at the opinion are rejected by the tribunal of fact or cannot be proved through admissible evidence.

There is abundant evidence that a failure by a party to meet the proof of assumption rule will render expert opinion irrelevant. (See for example *Chaina v Presbyterian Church (NSW) Property Trust (No. 13)* [2013] NSW SC 1057.

In the *Chaina* case there were two expert reports upon which numerous other expert reports were said to be based.

The defendants pointed to assumptions which were made in a number of the plaintiff's expert reports and then drew the Court's attention to other evidence in other expert reports served by the plaintiff (i.e. not by the defendant) which the defendant submitted did not provide the necessary evidence to support the assumptions made.

The basis of the complaint made by the defendants about those various reports was essentially a failure of the "proof of evidence rule" as articulated in the judgement of Heydon J in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 and [2011] 243 CLR 588 at [90]. Heydon J said "*the function of the proof of assumption rule is to highlight the irrelevance of expert opinion resting on assumptions not backed by primary evidence*".

The basic warning is that expert reports ought first of all identify any assumptions which underlie the conclusions in the report and then in the second case, provide a proper basis upon which the identification of proof of those assumptions can be made to the requisite standard.

A failure to do so will render the expert report inadmissible.

In giving evidence experts should always explain the extent to which they have relied on the work of others in arriving at a conclusion on the proved facts and should provide detail of the nature of the sources on which they have relied.

Cross-Examination

Cross-examination has two purposes. In the first place cross-examination seeks to elicit information concerning facts in issue or relevant to the issue that are favourable to the party on whose behalf the cross-examination is conducted. In the second place, cross-examination seeks to cast doubt upon the accuracy of the evidence in chief against such a party.

Frekelton has described cross-examination as "*the pre-eminent way of making expert witnesses accountable for their views that they have expressed in their reports or in the course of examination in chief.*"[13]

In a simple sense cross-examination is either as to the issue in question or as to the credit of the witness giving evidence. Expert witnesses are generally not cross-examined as to credit in the same way as a lay witness might be cross-examined. It would be unusual for a Judge considering the evidence of witnesses to find totally against an expert witness on the basis of credit. The usual approach is to suggest that a Judge prefers the evidence of one witness as against the evidence of another generally because of the approach taken or because of the unacceptability of some assumptions made by expert witnesses. It is unusual that an expert would be completely "demolished" by cross-examination. The more usual outcome is that a tribunal is left with some doubts as to the thoroughness of the approach taken by the expert in preparing his or her report. Nonetheless cross-examination is a very important part of the process to which an expert witness submits him or herself. Expert witnesses will generally find that the most effective cross-examination of them is carried out by barristers and solicitors who have had adequate time for preparation. Expert witnesses should also be aware of what is frequently referred to as the rule in *Browne & Dunn* (1894) 6 R 67 (HL). Generally the rule of Browne & Dunn is that a party

[13] Australian Lawyer 1999, p. 20.

must put that party's case to any opponent's witnesses in cross-examination. The rule has been explained in Australia by Hunt J. in *Allied Pastoral Holdings Pty. Ltd. v. Commissioner of Taxation* (1983) 1 NSWLR 1 at 16 where he said:-

> "*It has in my experience always been a rule of professional practice that, unless notice has already been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation r to contradict the inference sought to be drawn.*"

As with report writing it is impossible to be prescriptive as to the matters which will be covered in cross-examination or as to the matters which need to be prepared in order to confront (and survive) with one's opinions intact (a cross-examination). Frekelton in an article in 1995 on cross-examination identified a number of factors which are relevant to the admissibility of scientific evidence. Those factors which are listed below are, in reality, matters which will be probed in cross-examination where the cross-examiner has had the benefit of discussions with experts prior to rising in Court to cross-examine. The factors are these:-

- the potential rate of error;
- the existence and maintenance of standards;
- the care with which the technique has been employed and whether it is susceptible to abuse;
- whether there are analogous relationships with other types of techniques that are routinely admitted into evidence;
- the presence of failsafe characteristics;
- the expert's qualifications and status;
- the existence of specialised literature;
- the novelty of the technique and its relationship to more established areas of scientific analysis;
- whether the technique has been generally accepted by experts in the field;
- the nature and breadth of the inference adduced;
- the clarity with which the technique may be explained;
- the extent to which basic data may be verified by the court;
- the availability of other experts to evaluate the technique; and
- the probative significance of the evidence.

As can be seen from the list above, subjecting oneself to cross-examination as an expert in Court proceedings requires a high degree of professional competence and a good grasp of wide ranging matters relevant to any area of expertise. It requires in particular a capacity to explain complex processes and relationships in simple language and perhaps most importantly confidence in the conclusions which have been reached in an expert report. Above all, reports ought be characterised by logical consistency.

Frekelton's description of cross-examination is apt. he says[14]:-

> "*Cross-examination of expert witnesses is a subtle exercise whose fundamental purpose is to cast doubt on the expert's assumptions and the probative value of his or her opinions. It may encompass collateral ends such as to commit the witness to specifics which an equally or better qualified witness will later refute. Often its objective is to secure from the witness advantageous concessions that enable a final*

[14] Ibid p.23.

address to emphasise that more than one interpretation can professionally be given of the date before the Court. In other words, doubt exists and the expert's evidence cannot be accepted without reservation."

Different legal practitioners adopt different modes of cross-examination. For an expert witness it is important that, in order to avoid creating an adverse impression upon the tribunal of facts answers in cross-examination should be:-

(a) given with courtesy and in a professional manner;
(b) framed with clarity and be unambiguous;
(c) be concisely stated if possible;
(d) be given without equivocation.

Some of the techniques with which expert witnesses will be confronted include:-

1. A straight out aggressive confrontation;
2. Subtle and probing cross-examination based upon thorough investigation of the evidence and proper understanding of the background against which that evidence is given;
3. Insinuation whereby the cross-examiner may seek to raise material now known to the expert or to draw attention to alternative approaches or methodologies which may have been used by the expert which, it will normally be alleged, may have produced results more favourable to the opposition's case;
4. Undermining of an expert witness's credit which could occur in the context of either attacking the expert's qualifications, thoroughness of the expert's analysis of the problems at hand or the thoroughness of the research carried out by the expert. It may also involve attack upon the capacity of the expert to provide opinions relevant to the matters in question.

In all aspects of cross-examination of an expert by a lawyer, it might be thought that an expert retains one particular advantage namely that the person being cross-examined is an expert whereas the person doing the cross-examining unless he or she is that unusual species of lawyer which has additional professional qualifications as a doctor or as an engineer or as some other professional, is a lay person so far as the area of expertise is concerned. The way in which lawyers generally cope with their own lack of particular knowledge of areas of expertise is by conferring with other recognised experts, normally, those experts that will be called by the party represented by the lawyers.

Cross-examination is generally the area in which experts can be "unravelled" by a skilled practitioner and in that sense it is important for experts giving evidence to attend Court fully prepared which involves have an awareness not only of what is contained in that expert's own report but having read and considered in particular details expert report provided by other parties. Dealing with that aspect of an expert's work normally involves extensive conferences with the legal practitioners involved in presentation of the case. Increasingly, experienced practitioners rely upon experts to provide reports in reply to matters raised by other experts.

Re-examination

Once a cross-examination is finished the legal practitioner who called the expert in the first place is given an opportunity to re-examine the witness. The purpose of re-examination is to remove ambiguities and uncertainties but also to clarify answers given in cross-examination which unless supplemented or unexplained would leave a Court with an impression of the matter of fact whether they are in issue or whether they relate to credibility which impression is capable of allowing a construction unfavourable to a party calling a witness or which represent a distortion or incomplete account of what the facts really are according to the expert who is giving evidence. As with evidence in chief, questions in cross-examination may not be leading and in any event can only relate to matters which have been raised in cross-examination.

Section 5 : Conclusions

There is however another reason for great care to be taken in the preparation of expert reports. The Courts recognise that experts may possess differing opinions. For example, in *Miller Steamship Company Pty. Ltd. v. Overseas Tankship (UK) Limited*[15], Walsh J. said in relation to expert evidence:-

> "*Professors Hunter, Parker and Tuttenham called for the Defendant, and Professor Kilroy for the Plaintiff, are all learned intelligent men and I have no doubt that they gave their evidence honestly, although affected to a greater or less degree by the kind of unconscious bias which is a well-known characteristic of expert evidence.*"

It should however be recalled that experts are not philanthropists and produce reports and give evidence generally pursuant to a contract. Contracts carry with them an implied contractual duty to exercise reasonable skill and care. While the standards of reasonable care and skill allows for a margin of differing opinion and even possibly a degree of error an expert must be careful not to be negligent in the preparation of report which will be relied upon by a client. The general test for the identification of a negligently produced opinion is that it must be shown that the opinion is such that it could not have been arrived at by the exercise of reasonable care and skill. The question of professional liability for negligence was considered by the House of Lords in *Arenson v. Casson Beckman Rutley & Company*[16]. In that case it was held that a valuer who had been called upon to make a valuation for two parties could be held liable in damages for negligence. In the course of that decision, Lord Wheatley[17] said:-

> "*Since Hedley Byrne & Company Limited v. Heller & Partners Limited*[18]*, it is clear, if it ever was in doubt, that all persons who express an opinion which is negligent are liable for that negligence to persons who are within a relationship which is recognised by law and who have suffered damage as a result thereof.*"

In that same case, Lord Fraser said:-

> "*The general rule that a person who professes special skill or knowledge is liable for negligence if he fails to show such knowledge and skill and to take such care and precautions as are reasonably expected of a normally skilled and competent member of a profession or trade in question.*"

Consideration of those matters raised above would seem to suggest that it is not only a question of professional competence and pride in performance by a professional that would lead to the taking of great care in the preparation of reports and the giving of evidence but that, lurking in the back of the mind of every expert who prepares reports and gives evidence pursuant to a contract is the spectre of an action for negligence being brought against them if they fail to exercise due care and skill in the preparation of such reports. Some comfort can however ben taken from the observations of Lord Denning in *Whitehouse v. Jordan*[19] where he observed that the law does make allowances for errors of judgment "*otherwise there would be the danger in all cases of professional men, of their being liable whenever something happens to go wrong*".

The degree of care and skill which a Court would demand from a prudent and skilled engineer is that which would be exercised by a hypothetically reasonably skilled engineer. In deciding whether an engineer who has the unpleasant experience of being sued for negligence has or has not attained that hypothetical standard, the Courts are reluctant to sustain a claim in negligence if the Defendant engineer

---

[15] (1963) NSWR 737 at 753.
[16] (1977) AC 405.
[17] opsin. P.426.
[18] *(1964) AC 465*
[19] (1980) 1 All E.R., 650.

has acted in accord with the general and approved practice of his or her profession. A consequence of that approach is that an engineer would not normally be held liable in negligence merely on the ground that he or she used a particular engineering technique or mode of analysis provided that technique or mode of analysis was a well-practices professional method of reaching a conclusion. Engineers however stand in a slightly more precarious position than professionals such as town planners or valuers who rely upon the exercise of professional judgement in expressing opinions. In many instances engineers will be found to be able to provide a degree of objectivity in their assessment that is not capable of being achieved by other "opinion based" professions.

The duties and responsibilities of experts giving evidence in Court was referred to by Cripps J. in *Lane v. The Warden of the Municipality of Devonport*[20] where he said:-

> "*Valuers, no less than advocates, have some duties to a court as well as to those who instruct them. Such duties involve at least the obligation to disclose frankly and fully to the court all the material facts of any sale which he is urging the court to adopt as a standard of value. In his interpretation and explanation of those facts the court has come to expect, and not necessarily to approve, that he will, be it unwittingly or not, favour the interest of the party that instructs him and courts can, and do, guard against such a tendency. The facts must be disclosed; against error due to their suppression the court cannot protect itself save by insisting on literal and complete compliance with the duty of disclosure that I have mentioned*".

In the Land Court I have often bemoaned the failure of valuers to produce what are otherwise referred to as "speaking" valuations.

That is to say a failure to produce valuations which on their face reveal the various calculations done by the valuer to come to the valuation for which he or she contends.

For a detailed and informative legal discussion on what constitutes a "speaking valuation" I refer any interested reader to the decision of Palmer J in *Kaniva Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSW ConvR 55-985 and the Court of New South Wales Court of Appeal decision in the same case [2002] NSW ConvR 56-23. In that case the Courts at both levels were required to consider whether the valuer had made clear the basis upon which his valuation was made.

In my experience, particularly in valuation of land appeals, there is frequently a failure by valuers to provide a "speaking valuation" which clearly identifies the basis upon which a valuer has moved from a sale of improved land to a unimproved or site value for land the subject of an appeal.

Often a selling price is provided and then a blanket statement as to an analysed price is made without any detail being provided as to how that analysis occurred and, in particular, what improvements and the values attached to those improvements had been taken into account.

It is all the more concerning when reports of that sort are provided in appeals where self-represented litigants without particular advocatorial or forensic cross-examination skills are appearing for themselves and where they lack the ability to conduct any forensic cross-examination of the valuer who has blithely produced a clearly "non speaking" report.

I often feel inclined to jump down off the bench, go and stand behind the bar table and cross-examine the valuer myself in order to assist the unrepresented litigant. However I am ethically precluded from such course.

---

[20] 12 The Valuer 382.

It is to be remembered that valuation evidence is not a scientifically precise exercise and, at the end of the day, the Court is confronted really only by opinions from qualified experts.

In conclusion it can be said that the giving of expert evidence in Court has the potential to be a traumatic event the sense that an expert can reasonably expect that his or her opinions as contained within a written report or as articulated orally in evidence in chief will be subjected to detailed scrutiny and will be challenged where the conclusions are contrary to the interests of some other party. Giving of expert evidence requires an intellectual and professional robustness. To the extent that experts are challenged by Barristers and Solicitors they ought not regard that as any sort of a professional attack but rather as an exercise by the lawyers acting on the instructions of and in the interests of their party. The lawyers have at all times a duty, within the rules of the court and within the bounds of their ethical responsibilities to advance such evidence as will (a) assist the Court; and (b) assist them to prove their client's case. Experts ought not, at the end of the day, have a sense of having let their client down if their opinions and views do not, in the final analysis by the tribunal whether it be a Judge or some other quasi judicial tribunal, find favour or a rejected because the tribunal prefers the approach of another expert. So much is the purpose of the adversarial procedures adopted in most Courts.

John Gallagher QC, in a paper delivered a couple of years ago, concluded in his paper the following description relating to expert witnesses which contains some guidance to Barristers in particular as to how they ought deal with expert witnesses in Court. The extract contains within it warnings to both experts and lawyers.

> "*An expert witness may express an opinion which is based in part on facts which are not known to him personally and which at the end of the day are not properly proved. In strict theory if the party advancing the expert fails by other evidence to establish these facts, the opinion should be disregarded. Yet as a matter of common practice such opinions are commonly relied on.*
>
> > *'Expert witnesses are a much maligned body of men. It is true that some of them may be charlatans, but for the most part they are men who are concerned to give help to the Court upon the basis of a life-time's experience and training, and moreover, training within a particular field. Nothing is to be gained by endeavouring to bully them (or, for that matter, any other witness). Although your object may often be to show that the extent of their knowledge and experience is less than the expert whom you propose to call, this needs to be done with a degree of tact and judgment. You occupy a powerful position in court in relation to an expert. To make him look silly (if you are able); to cause him to be the centre of your ridicule (if you are competent to do so), are not only unkind and unnecessary pursuits but may damage him in the pursuit of his own profession by destroying his reputation. Experts for the most part are dealing with matters which can be the subject of differing opinions. If the subject matter of their evidence is something of scientific exactitude, the you are unlikely to get very far with cross-examination in any event.'*
>
> *Courts have commented on the demeanour of expert evidence on some occasions as having exhibited 'unbecoming arrogance'.*"

Failure by an expert to properly prepare in every way for the giving of expert evidence can, unless providence smiles mightily upon the expert, have only one predictable outcome which is, in its consequence, rather similar to the Charge of the Light Brigade in 1854.